

04744

SENATE JUDICIARY  
EXHIBIT NO. SB106 4  
DATE 1/12/11  
BILL NO. SB106  
**FILED**

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 04-\_\_\_\_\_

STATE ex rel. MIKE McGRATH, Attorney General,  
State of Montana,

NOV 04 2004

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Applicant,

v.

JUDY MARTZ, Governor, State of Montana, and  
JAMES SANTORO, Chief Legal Counsel, Office of the Governor,

Respondents.

---

**APPLICATION FOR WRIT OF PROHIBITION**

---

The State of Montana by Attorney General Mike McGrath, pursuant to the Montana Constitution, article VI, section 4(4), Mont. Code Ann. § 3-2-202, and Mont. R. App. P. 17, applies for a writ prohibiting Governor Judy Martz and her chief legal counsel, James Santoro, from unlawfully assuming the constitutional office and rights of the Attorney General as legal officer of the State.

**ISSUE PRESENTED**

Whether the Governor may direct the Attorney General to intervene in litigation relating to title to State land when the Board of Land Commissioners and the Attorney General have determined that such intervention would not be in the State's best interest?

## **PARTIES**

Applicant Mike McGrath is the duly elected Attorney General of the State of Montana, and as such is "the legal officer of the state." Mont. Const. art. VI, § 4(4). As Attorney General, he serves on the Board of Land Commissioners, which "has the authority to direct [and] control . . . school lands." Mont. Const. art. X, § 4.

Respondent Judy Martz is the duly elected Governor of the State of Montana, and as such holds "[t]he executive power" and "shall see that the laws are faithfully executed." Mont. Const. art. VI, § 4(1). Governor Martz also serves on the Board of Land Commissioners.

## **BACKGROUND**

On October 18, 2004, the Board of Land Commissioners (hereinafter "the Board") considered a proposal for the State to intervene as a plaintiff in an action in federal court that sought to quiet title to the State's mineral interest in the submerged lands of the Tongue River, namely Fidelity Exploration & Production Company v. United States of America, et al., Cause No. CV-04-100-BLG-RWA (D. Mont.). (See Affidavit of Attorney General Mike McGrath, attached hereto as Ex. A.) Secretary of State Bob Brown, a member of the Board, moved the Board to have the State of Montana, through the Department of Natural Resources and Conservation, intervene in the Fidelity Exploration litigation to defend the State's mineral interests. (McGrath Aff., ¶ 3.) The Board rejected the proposal by a three to two

margin, with Attorney General McGrath, Superintendent of Public Instruction Linda McCulloch, and State Auditor John Morrison opposing the proposal. (Id. at ¶ 4.) Governor Judy Martz and Secretary of State Bob Brown voted in favor of the proposal. (Id.)

Despite the Board's decision not to intervene on behalf of the State, the Governor, through her counsel, filed a motion to intervene in the Fidelity Exploration case on October 22, 2004. (See State's Motion for Intervention, attached hereto as Ex. B.) The Governor's motion to intervene purports to bring the State, and not just the Governor in her official capacity, into the Fidelity Exploration litigation as a named party.

The Attorney General sent a letter on October 26, 2004, in which he informed the Governor's legal counsel that he could appear in the Fidelity Exploration litigation on behalf of the Governor to represent any interest that the Governor "may have in her official capacity." (See Oct. 26, 2004 Letter from Attorney General McGrath to James Santoro, attached hereto as Ex. C.) The Attorney General further directed Mr. Santoro to refrain from taking any action on behalf of the State or the Board in the Fidelity Exploration litigation and to file an amended pleading to clarify that Mr. Santoro did not seek to intervene in the Fidelity Exploration litigation on behalf of the State or the Board. (Id.)

The Governor responded in a letter on October 28, 2004. The Governor informed the Attorney General that she had directed her legal counsel to intervene on behalf of the State in the Fidelity Exploration litigation. (See Oct. 28, 2004 Letter from Governor Martz to Attorney General McGrath, attached hereto as Ex. D.) The Governor further directed the Attorney General to assist her legal counsel's efforts. (Id.) The Governor cited Mont. Code Ann. § 2-15-201(5) in support of her authority to direct the Attorney General to assist her legal counsel. (Id.)

### **AUTHORITY FOR ORIGINAL JURISDICTION**

This Court possesses original jurisdiction to “issue, hear, and determine writs” as provided by law. Mont. Const. art. VII, § 2(1). An original proceeding may be “justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy.” Mont. R. App. P. 17(a). In light of these authorities, this Court exercises original jurisdiction when:

(1) constitutional issues of major statewide importance are involved; (2) the case involves pure legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process inadequate. See Butte-Silver Bow Local Gov't v. State, 235 Mont. 398, 401, 768 P.2d 327 (1989). The Attorney General's Application presents all three factors.

First, the authority of the Attorney General to act as the legal officer for the State presents a constitutional issue of major statewide importance. A clearly defined authority to bring and defend lawsuits on behalf of the State, and not to do so when a lawsuit is not in the State's legal interests, proves critical to the protection of State interests in the innumerable legal controversies that the State faces. More specifically, the Fidelity Exploration litigation implicates the State's relationship and continuing legal dealings with Indian Tribes throughout the State, with statewide consequences to the State's fiscal and natural resources. See Montana Power Co. v. Pub. Service Comm'n, 214 Mont. 76, 77, 768 P.2d 842 (1984) (taking original jurisdiction over conflict between Board of Natural Resources and Conservation and the Public Service Commission).

Second, the constitutionality of the Governor's purported intervention into the Fidelity Exploration litigation on behalf of the State involves pure questions of statutory and constitutional construction. No disputed facts are at issue.

Third, the Governor's unlawful intervention into the Fidelity Exploration litigation on behalf of the State requires this Court's urgent attention to prevent irreparable harm to the State's legal position in that and other proceedings. The Attorney General could himself intervene in the Fidelity Exploration litigation to clarify that the Governor's unconstitutional intervention exceeds her constitutional authority. Such an intervention by the Attorney General would be self-defeating,

however, because it would further enmesh the State in the litigation, something the Attorney General and the Board have determined to be against the State's interests.

Moreover, such an intervention would be futile, as only this Court can address definitively the state law question of the Governor's authority to intervene on behalf of the State in federal court. Allowing the Governor to proceed on behalf of the State in that litigation without addressing the threshold issue of the Governor's authority to do so would be "singularly inappropriate," and could waste "a great deal of time and expense." State ex rel. Greely v. Water Court, 214 Mont. 143, 150, 691 P.2d 833 (1984); see also Montanans for the Coal Trust v. State, 2000 MT 13, ¶ 30 (taking original jurisdiction to avoid aggravating "prolonged litigation"); Montana Power Co., 214 Mont. at 78 (taking original jurisdiction "may also promote judicial economy"); Butte-Silver Bow Local Gov't, 235 Mont. at 402 (taking original jurisdiction when "resolution of the issues presented herein is necessary to eliminate or reduce a multiplicity of future litigation; . . . and to eliminate needless expenditure of public funds on procedures that otherwise might subsequently declared illegal."), quoting Grossman v. State, 209 Mont. 427, 432-33, 682 P.2d 1319 (1984).

In addition, this Application seeks relief that "would have the force and effect of a writ of prohibition against state officers and is, therefore, a legitimate purpose for which original jurisdiction may be exercised." Montanans for the Coal Trust,

2000 MT at ¶ 31. For these reasons, the Court should assume original jurisdiction over the Attorney General's Application.

### **AUTHORITY FOR RELIEF REQUESTED**

#### **I. MONTANA'S CONSTITUTION PROVIDES THE ATTORNEY GENERAL WITH THE AUTHORITY TO SERVE AS THE STATE'S CHIEF LEGAL OFFICER WITHOUT INTERFERENCE BY OTHER STATE OFFICIALS.**

Montana's Constitution provides that "[t]he attorney general is the legal officer of the state and shall have the duties and powers provided by law." Mont. Const. art. VI, § 4(4). This expression of the Attorney General's duties was an innovation; the 1889 Constitution delegated "no powers or duties specifically" to the Attorney General. State ex rel. Nolan v. District Court, 22 Mont. 25, 27, 55 P. 916 (1899).

The delegates to the Constitutional Convention defined "legal officer of the state" in their reports and debate, making clear the Attorney General's exclusive authority to represent the State in legal actions. Cf. Colorado ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (holding that Attorney General possessed authority to initiate original proceeding to contest constitutionality of legislative enactment). According to the Executive Committee Report, the Attorney General "prosecutes or defends all litigation in which the state is a party" and "is legal counsel to all state officers and agencies." (Vol. 1 at 442.) In debate, Delegate Joyce emphasized that the Attorney General's duty to "prosecute[] and defend[] all

litigation in which the state is a party” was “in addition to,” and not subsumed in, his duties as legal adviser to the Governor. (Verbatim Tr. at 844.) The Report acknowledged some disagreement about the Attorney General’s powers relative to the Governor’s, but concluded that the Attorney General must retain independent authority to represent the State in legal actions:

[The Attorney General] is legal adviser to the governor, and here there arises divergence of opinion as to whether he should be appointed by the governor (so as to be fully compatible with his client, so to speak) or be elected by the people (so as to be primarily responsible to them).

The majority of our committee believes he should be in independent status as an elected officer, charged with enforcement of all the law for all the people. Since the governor already has much authority, through the appointing power particularly, we favor having an independent attorney general free to inquire into the faithful performance of duty by any state official or employee. We believe the governor should have the right and opportunity to choose his own legal counsel, but that such counsel should be a part of his official staff rather than the attorney general.

(Exec. Comm. Comments, Vol. 1 at 442.) The minority concurred on this point.

(Vol. 1 at 463.)

Though the Executive Committee expected the Governor to choose her own legal counsel, nowhere did the Constitutional Convention contemplate the Governor’s legal counsel performing the Attorney General’s duty to represent the State in litigation. The Report further clarified the intended relationship between the Attorney General and the Governor in defining the Governor’s duties: “Of course, [the governor] is limited in this connection by laws passed by the legislature, and is

further limited by this section from direct responsibility of performing the duties assigned the secretary of state and the attorney general.” (Vol. I at 446.)

The Constitutional Convention delegates were well aware of the potential for conflict between the Governor and the Attorney General. In the year preceding the Constitutional Convention, the Attorney General sued the Governor’s State Highway Commission over the Commission’s authority to hire outside counsel to represent itself in the Commission’s name. This Court, noting “the lack of constitutionally enumerated duties of the attorney general” in the 1889 Constitution, held that the Governor “has the power to either direct the attorney general or may himself employ additional counsel.” Woodahl v. State Hwy. Comm’n, 155 Mont. 32, 37, 465 P.2d 818 (1970).

Having witnessed this recent dispute over the Attorney General’s authority, the delegates repeatedly rejected attempts to subject the Attorney General’s legal duties to the Governor’s approval. Delegate Cate, noting that then Attorney General Woodahl “has been advocating appointment of the Attorney General” by the Governor, proposed that the Attorney General be appointed rather than elected, because “[t]he Governor should have his own attorney, and it ought to be the Attorney General.” (Verbatim Tr. at 867.) The opposing responses sounded a single theme of Attorney General autonomy in representing the State: in a recent school lands dispute “it would have been very unhealthy to have had an appointive Attorney General whose first

allegiance was solely to the Governor, rather than an elective one who represented the interests of the people” (Delegate McNeil at 868); “what we’re talking about is creating the relationship between the two most important offices in the whole Executive branch, and in theory and, I think, in practice, they should be kept apart” (Delegate Garlington at 869); “he should be an elected official who is responsible to the people and not subservient to some Governor who has appointed him,” (Delegate Wilson at 869-70). The proposal to have the Attorney General serve the Governor rather than the State failed on a voice vote (Verbatim Tr. 870), confirming the broad reading of article VI, section 4(4) as providing for an exclusive duty to prosecute and defend all litigation in which the state is a party.

**II. COMMON LAW TRADITION, AMPLIFIED BY MONTANA’S STATUTORY AND CONSTITUTIONAL MANDATE, GRANTS THE ATTORNEY GENERAL THE EXCLUSIVE POWER TO DETERMINE WHETHER LITIGATION SERVES THE PUBLIC INTEREST.**

Courts generally have held that in the exercise of his common-law powers, “the attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public.” State ex rel. Olsen v. Public Service Comm’n, 129 Mont. 106, 115, 283 P.2d 594 (1955), quoting 5 Am. Jur., § 5 at 235 & § 8 at 238. Obviously there can be no dispute “as to the right of an attorney general to represent the state in all litigation of a public character.” Olsen, 129 Mont. at 115. In a case with similar

origins in an out-voted Governor on the Board of Land Commissioners, this Court recognized the common law authority of the Attorney General to sue on behalf of the State with complete independence from the Governor. State ex rel. Jones v. Board of Land Comm'rs, 128 Mont. 462, 279 P.2d 393 (1954), rev'd on federal law grounds sub nom. Montana ex rel. Johnson v. State Board of Land Comm'rs, 348 U.S. 961 (1955).

The Attorney General must put the interests of the public ahead of all other legal interests. "Paramount to all of his duties, of course, is his duty to protect the interest of the general public." Superintendent of Ins. v. Attorney Gen., 558 A.2d 1197, 1202 (Me. 1989). The Attorney General must not yield to the directives of other government agencies or officials if he does not believe those directives to be in the public interest. The Attorney General thus has both the right and the responsibility to promote the interests of all the citizens of the state, not just of certain segments of government. See, e.g., State ex rel. Olsen v. Public Serv. Comm'n, 129 Mont. at 115 (Attorney General represents the public and may bring all proper suits to protect its rights); State ex rel. Allain v. Mississippi-Pub. Serv. Comm'n, 418 So. 2d 779, 782 (Miss. 1982) (the Attorney General's "responsibility is not limited to serving or representing the particular interests of State agencies, including opposing agencies, but embraces serving or representing the broader interests of the State") (citing EPA v. Pollution Control Bd., 372 N.E.2d 50, 52 (Ill. 1977)).

Modern statutes and constitutional provisions reinforce and strengthen this common law concept of the role of the Attorney General, to the point that

there can be no dispute as to the right of an Attorney General to represent the state in *all* litigation of a public character. The Attorney General represents the public, may bring *all* proper suits to protect its rights, and *he alone* has the right to represent the state as to *all litigation* in which the subject matter is of statewide interest.

7 AM. JUR. 2D *Attorney General* § 14 (citations omitted) (emphasis added).

Moreover, the Attorney General's views in litigation prevail when a conflict arises between his views and those of the state agencies and officers whom the Attorney General represents. Battle v. Anderson, 708 F.2d 1523, 1529 (10th Cir. 1983) (holding that the views of the Oklahoma Attorney General in litigation "must prevail" over the views of the legal counsel for any particular state defendant). The reason for this rule is clear: although the Attorney General is obligated to represent state officials and agencies to the best of his abilities, he need not--indeed, must not--do so at the expense of the people as a whole. Reiter v. Wallgren, 184 P.2d 571, 575 (Wash. 1947) (though Attorney General may represent state officers, "it still remains his paramount duty to protect the interests of the people of the state"). To do so "would be an abdication of official responsibility." Feeney v.

Commonwealth, 366 N.E.2d 1262, 1266 (Mass. 1977) (quoting Secretary of Admin. and Fin. v. Attorney Gen., 326 N.E.2d 334, 338 (Mass. 1975)).<sup>1</sup>

Absent a constitutional or statutory limitation, the Attorney General has broad discretion to determine what legal matters fall within the public interest and require his attention. State v. Heath, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) (Attorney General “may exercise such authority as the public interest may require” and “has very broad discretion to decide what matters are of public interest and require its attention”). It readily follows that the Attorney General represents the proper party to determine whether and when a given lawsuit serves the public interest. The Attorney General possesses the exclusive and absolute discretion to determine whether and when to initiate a lawsuit in a matter of public interest. State v. Monarch Chemicals Inc., 443 N.Y.S.2d 967, 969 (1981) (affirming Attorney General's common law power to bring action to abate environmental nuisance despite disapproval of state oversight agency); Superintendent of Ins. v. Attorney Gen., 558 A.2d 1197, 1201 (Me. 1989) (holding that Attorney General had standing to seek judicial review under administrative procedures act).

The Attorney General also possesses the exclusive and absolute discretion to set state legal policy and to control all aspects of litigation for and against the State,

---

<sup>1</sup> See also Ex parte Weaver, 570 So. 2d 675, 684 (Ala. 1990) (upholding Attorney General's authority to dismiss state insurance department proceedings over objection of state insurance commissioner); State ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813, 821 (Okla. 1973) (upholding authority of Attorney General to settle pending litigation).

including whether to initiate or intervene in litigation. Ex parte Weaver, 570 So. 2d 675, 677 (Ala. 1990) ("As the state's chief legal officer, the attorney general has power, both under common law and by statute to make any disposition of the state's litigation that he deems for its best interest. . . . He may abandon, discontinue, dismiss, or compromise it").<sup>2</sup>

### **III. THE GOVERNOR'S ATTEMPT TO INTERVENE IN THE FIDELITY EXPLORATION LITIGATION EXCEEDS HER AUTHORITY TO ACT ON BEHALF OF THE LAND BOARD.**

The Governor's attempt to intervene into the Fidelity Exploration litigation not only exceeds her general authority under the Montana Constitution, but also her specific authority to act on behalf of the State in state lands matters. The Montana Constitution gives only the Board authority "to direct [and] control . . . school lands and lands which have been or may be granted for the support and benefit of the

---

<sup>2</sup> See also State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo. Ct. App. 1980) ("It is for the attorney general to decide where and how to litigate these issues involving public rights and duties and to prevent injury to the public welfare"); Public Defender Agency v. Superior Court, 534 P.2d 947, 950 (Alaska 1975) (Attorney General possesses "power to make any disposition of the state's litigation which he thinks best"); Perillo v. Dreher, 314 A.2d 74, 79 (N.J. Super. Ct. App. Div. 1974) (recognizing that Attorney General has "the exclusive power to control all litigation to which the State is a party"); Opinion of the Justices, 373 A.2d 647, 649 (N.H. 1977) (Attorney General has "broad authority to manage the state's litigation and to make any disposition of a case which he deems is in the state's best interest"); Michigan State Chiropractic Ass'n v. Kelley, 262 N.W.2d 676, 677 (Mich. App. 1977) (Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed").

various state educational institutions.” Mont. Const., art. X, § 4. Consistent with his general powers to prosecute and defend litigation on behalf of the State, “[a]ll actions . . . affecting any state lands . . . shall be conducted by the attorney general.” Mont. Code Ann. § 77-1-111(1). Even before the present Constitution’s expansive specification of the Attorney General’s powers, this Court recognized the Attorney General’s prerogative to prosecute claims on behalf of the Board without deferring to the Governor. See State ex rel. Jones, 128 Mont. 462. Nothing in the Constitution or any statute grants the Governor the authority to act unilaterally on behalf of the State in Board matters.

In fact, as noted by the Court in numerous other circumstances, constitutionally created boards or commissions, such as the Board of Land Commissioners, possess all powers conferred by Montana’s Constitution and other branches of government cannot add or detract from those duties. See, e.g., Board of Pub. Educ. v. Judge, 167 Mont. 261, 538 P.2d 11 (1975) (holding unconstitutional the Legislature’s attempt to impose a duty of administering vocational education on the Board of Public Education when the Constitution spelled out the Board’s duties); Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975) (holding that Legislature’s attempt to control privately raised moneys and college president salaries “indicates a complete disregard for the Regents’ constitutional power”).

**IV. THE ATTORNEY GENERAL'S POWERS PURSUANT TO ARTICLE IV, SECTION 4 TRUMP MONT. CODE ANN. § 2-15-201(5) TO THE EXTENT THAT THEY CONFLICT.**

The Governor cites Mont. Code Ann. § 2-15-201(5), in support of her direction to the Attorney General to provide assistance to her legal counsel in the Fidelity Exploration litigation. That subsection provides:

Whenever any suit or legal proceeding is pending against this state or which may affect the title of this state to any property or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state and may employ such additional counsel as he may judge expedient.

Mont. Code Ann. § 2-15-201(5). This and any other statutory powers given to the Governor to litigate or direct litigation in the State's name must conflict with the Constitution's clear mandate that the Attorney General, and not the Governor, is "the legal officer of the state." Mont. Const. art. VI, § 4(4). The Governor's attempt to prosecute and defend any litigation on behalf of the State clearly exceeds the limitation set in the Constitutional Convention against her assumption of "direct responsibility of performing the duties assigned . . . the attorney general." (Vol. I at 446.)

To the extent it allows the Governor to direct litigation concerning school lands and other state lands under the Board's jurisdiction, § 2-15-201(5) also violates the Constitution's delegation of authority over those lands to the Board itself, and not the Governor alone. See Mont. Const. art. X, § 4. To the same extent, § 2-15-201(5) also conflicts with Mont. Code Ann. § 77-1-111(1) which,

consistent with the Constitution, directs that "[a]ll actions . . . affecting any state lands . . . shall be conducted by the attorney general."

Because § 2-15-201(5) cannot be reconciled with either the Constitution or the State Lands code, this Court should declare it unconstitutional.

### **CONCLUSION**

For the foregoing reasons, the Attorney General respectfully requests that the Court accept original jurisdiction and grant his Application for a Writ of Prohibition and a declaration that § 2-15-201(5) violates article VI, section 4(4) of the Montana Constitution. In the alternative, the Attorney General requests that the Court accept original jurisdiction and set a briefing schedule.

Respectfully submitted this 4th day of November, 2004.

MIKE McGRATH  
Montana Attorney General  
ANTHONY JOHNSTONE  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: 

BRIAN M. MORRIS  
Solicitor

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing

Application for Writ of Prohibition to be mailed to:

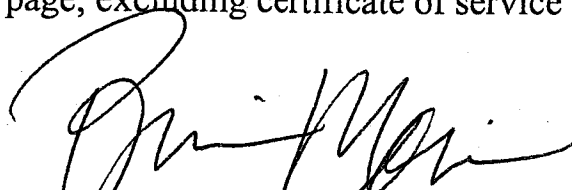
Mr. James Santoro  
Chief Legal Counsel  
Office of the Governor  
P.O. Box 200801  
Helena, MT 59620-0801

Mr. John Metropoulos  
Gough, Shanahan, Johnson & Waterman  
P.O. Box 1715  
Helena, MT 59624-1715

DATED: 4 November 2004 

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Application for Original Jurisdiction and Writ of Prohibition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 7,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

  
BRIAN M. MORRIS

1  
2  
3  
4  
5  
6 IN THE SUPREME COURT OF THE STATE OF MONTANA

7 No. 04-\_\_\_\_

8  
9 STATE ex rel. MIKE McGRATH, Attorney General,  
10 State of Montana,

11 Applicant,

12 v.

13 JUDY MARTZ, Governor, State of Montana, and  
14 JAMES SANTORO, Chief Legal Counsel, Office of the Governor,

15 Respondents.

16 AFFIDAVIT OF MIKE McGRATH

17 STATE OF MONTANA )  
18 : ss.  
19 County of Lewis and Clark )

20 MIKE McGRATH, being first duly sworn upon oath, deposes and says:

21 1. I am the Attorney General of the State of Montana and in that capacity I serve as  
22 a member of the Board of Land Commissioners (hereinafter "the Board").  
23  
24  
25

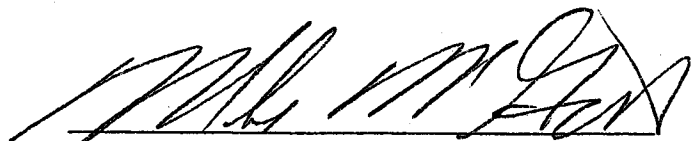
1           2.     On October 18, 2004, the Board considered a proposal to have the State of  
2 Montana intervene on behalf of the plaintiffs in an action in federal court that sought to quiet  
3 title to the State's mineral interest in the submerged lands of the Tongue River, namely  
4 *Fidelity Exploration & Production Company v United States of America, et al.*, U.S. District  
5 Court Cause No. CV-04-100-BLG-RWA.  
6

7           3.     Secretary of State Bob Brown moved the Board to have the Department of  
8 Natural Resources and Conservation intervene in a quiet title action to defend the state's  
9 mineral interest.

10          4.     Secretary of State Brown's motion failed three to two, with Secretary of State  
11 Brown and Governor Martz voting in favor, and Attorney General McGrath, State Auditor  
12 John Morrison, and Superintendent of Public Instruction Linda McCulloch opposing.  
13

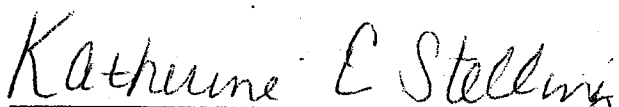
14          5.     The Board took no further action on this matter.

15     Affiant further sayeth not.

16  
17   
18 Mike McGrath

19     Subscribed and sworn to before me this 4th day of November, 2004.

20  
21  
22 (SEAL)

23   
24 Printed Name: Katherine E. Stelling  
25 Notary Public for the State of Montana.  
Residing at Helena, Montana.  
My Commission expires: 7-31-07

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing AFFIDAVIT  
OF MIKE McGRATH to be mailed to:

James Santoro  
Chief Legal Counsel  
Office of the Governor  
State Capitol  
P.O. Box 200801  
Helena, MT 59620-0801

John Metropoulos  
Gough, Shanahan, Johnson & Waterman  
P.O. Box 1715  
Helena, MT 59624-1715

DATED: March 4, 2007 

James W. Santoro  
Governor's Chief Legal Counsel  
Room 204, State Capitol,  
P.O. Box 200801  
Helena, MT 59620-0801  
(406) 444-3111  
(406) 444-5529 (facsimile)  
Attorney for State of Montana  
Proposed Plaintiff-Intervenor

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FIDELITY EXPLORATION & PRODUCTION  
COMPANY,

Plaintiff,

and

STATE OF MONTANA,

Proposed Plaintiff-Intervenor,

v.

UNITED STATES OF AMERICA; UNITED  
STATES DEPARTMENT OF THE INTERIOR;  
GALE NORTON, in her official capacity as the  
United States Secretary of the Interior; UNITED  
STATES BUREAU OF INDIAN AFFAIRS;  
DAVID ANDERSON, in his official capacity as  
Assistant Secretary, Bureau of Indian Affairs,

Defendants.

Cause No. CV-04-100-BLG-RWA

STATE OF MONTANA'S  
MOTION FOR INTERVENTION

COMES NOW the State of Montana ("State") and respectfully moves the Court for an  
order permitting the State to intervene as a Plaintiff-Intervenor under Rules 24(a)(2) and 24(b)(2)

of the Federal Rules of Civil Procedure to protect its sovereign, property, and financial interests and to fulfill its duties to its citizens in regard to navigable waterways and water.<sup>1</sup>

On July 27, 2004, Fidelity Exploration & Production Company ("Fidelity") filed a Quiet Title action, 28 U.S.C. § 2409a, against the United States. In its Complaint, Fidelity asserts that the United States, in trust for the Northern Cheyenne Tribe, has claimed title to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation, and that the United States' claim conflicts with the State's ownership of the bed of the Tongue River. Complaint, Introduction, attached hereto as Exhibit A. Fidelity asks the Court to issue an order quieting title in favor of the State to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation and consequently, Fidelity's ownership of seven (7) Oil and Gas Leases. Complaint, ¶ 30.

The basis for Fidelity's argument is that upon attaining statehood in 1889 the State was granted admission to the United States "on an equal footing with the original states." Complaint, ¶ 13. Admission under equal footing with the original states vested the State with the sovereign ownership of the bed of all navigable waters within its boundaries, including the Tongue River. However, by Executive Order issued by President William McKinley on March 19, 1900, the

---

<sup>1</sup> Federal Rule of Civil Procedure 24(c) provides that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Although Ninth Circuit case law has modified the duty to file a pleading simultaneously with a motion to intervene (*Beckman Indus. Inc. v. Intl. Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); see also *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1998)), the State hereby concurrently adopts the following paragraphs of Plaintiff Fidelity's Complaint: ¶¶ 1 through 25 and Prayer for Relief, ¶¶ 1 and 3. The State further alleges that pursuant to 28 U.S.C. § 2409a, it is entitled to a decree from the Court quieting title to the bed of the Tongue River east of the Northern Cheyenne Reservation in favor of the State and against all Defendants who may claim an interest conflicting with the State. Should the Court require the State to file a separate pleading, the State hereby requests that it be granted an additional twenty (20) days from the date it is granted intervention to further plead. Notice of the State's Motion for Intervention was provided to all parties on which Fidelity served a Summons and Complaint.

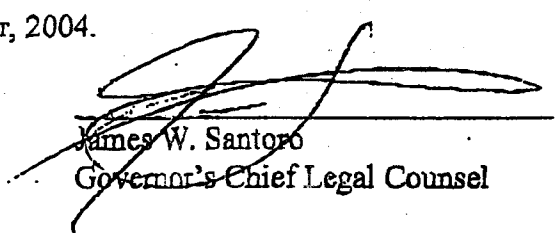
Northern Cheyenne Indian Reservation's eastern boundary was purportedly extended east to the mid-channel of the Tongue River. Fidelity asserts that the claims of the United States, in trust for the Northern Cheyenne Tribe, conflict with the prior and superior ownership of the State in the bed of the Tongue River, which it attained upon statehood. Complaint, ¶ 23.

The resolution of this action will directly and materially affect both the sovereign, property, and financial interests of the State as well as its ability to fulfill its duties to its citizens in regard to all navigable waterways and water within the State, which the State owns under Article X, Section 11, of the Montana Constitution of 1972 in trust for its citizens. In Fidelity's Complaint, Prayer for Relief, p. 6, ¶¶ 1 and 2, Fidelity seeks an order quieting title in favor of the State to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation and for an order quieting title in favor of Fidelity to seven (7) Oil and Gas Leases it purchased from the State in October of 2002. As a sovereign and proprietor, the State has legally-cognizable interests in the ownership of the bed of the Tongue River and taxes and royalties resulting from oil and gas developed from the leases therein. Moreover, it has interests in this matter arising from its duties to its citizens in connection with its ownership and management of navigable waterways and water from the benefit of its citizens. Therefore, the State seeks to intervene because the disposition of this action will impair or impede the State's ability to protect these interests, and because Fidelity cannot reasonably be expected to adequately represent the citizens of this State or the State's interests.

Pursuant to Local Rule 7.1(j), the State has contacted the attorneys for Fidelity and Defendants concerning this Motion. Fidelity does not object to this Motion and the United States indicates they will probably not actively oppose the intervention, although the United States reserves the right to do so.

For the reasons set forth herein and in the accompanying brief, the State requests this Court for an order permitting it to intervene as a Plaintiff-Intervenor under Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted this 21<sup>st</sup> day of October, 2004.

  
James W. Santoro  
Governor's Chief Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State of Montana's Motion for Intervention* was mailed, via U.S. mail, at Helena, Montana, on the 22<sup>nd</sup> of October, 2004, to:

Patricia Miller  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Indian Resources Section  
P.O. Box 44378  
Washington, DC 20026-4378

Jon Metropoulos  
Dana L. Hupp  
Gough, Shanahan, Johnson & Waterman  
33 South Last Chance Gulch  
P. O. Box 1715  
Helena, MT 59624

Civil Process Clerk  
Office of the United States Attorney  
2929 3d Avenue North, Suite 400  
P.O. Box 1478  
Billings, MT 59103

President George W. Bush  
The White House  
1600 Pennsylvania Avenue N.W.  
Washington, DC 20500

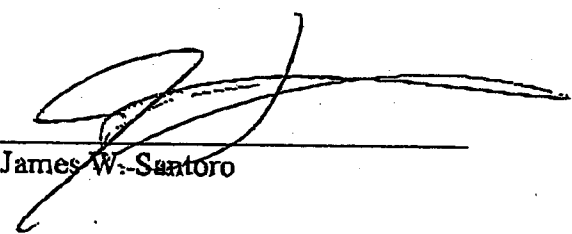
John Ashcroft  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530-0001

United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

Gale A. Norton  
Secretary of the Interior  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

United States Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

David W. Anderson  
Assistant Secretary - Indian Affairs  
Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240



---

James W. Santoro

of the Federal Rules of Civil Procedure to protect its sovereign, property, and financial interests and to fulfill its duties to its citizens in regard to navigable waterways and water.<sup>1</sup>

On July 27, 2004, Fidelity Exploration & Production Company ("Fidelity") filed a Quiet Title action, 28 U.S.C. § 2409a, against the United States. In its Complaint, Fidelity asserts that the United States, in trust for the Northern Cheyenne Tribe, has claimed title to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation, and that the United States' claim conflicts with the State's ownership of the bed of the Tongue River. Complaint, Introduction, attached hereto as Exhibit A. Fidelity asks the Court to issue an order quieting title in favor of the State to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation and consequently, Fidelity's ownership of seven (7) Oil and Gas Leases. Complaint, ¶ 30.

The basis for Fidelity's argument is that upon attaining statehood in 1889 the State was granted admission to the United States "on an equal footing with the original states." Complaint, ¶ 13. Admission under equal footing with the original states vested the State with the sovereign ownership of the bed of all navigable waters within its boundaries, including the Tongue River. However, by Executive Order issued by President William McKinley on March 19, 1900, the

---

<sup>1</sup> Federal Rule of Civil Procedure 24(c) provides that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Although Ninth Circuit case law has modified the duty to file a pleading simultaneously with a motion to intervene (*Beckman Indus. Inc. v. Intl. Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); see also *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1998)), the State hereby concurrently adopts the following paragraphs of Plaintiff Fidelity's Complaint: ¶¶ 1 through 25 and Prayer for Relief, ¶¶ 1 and 3. The State further alleges that pursuant to 28 U.S.C. § 2409a, it is entitled to a decree from the Court quieting title to the bed of the Tongue River east of the Northern Cheyenne Reservation in favor of the State and against all Defendants who may claim an interest conflicting with the State. Should the Court require the State to file a separate pleading, the State hereby requests that it be granted an additional twenty (20) days from the date it is granted intervention to further plead. Notice of the State's Motion for Intervention was provided to all parties on which Fidelity served a Summons and Complaint.

Northern Cheyenne Indian Reservation's eastern boundary was purportedly extended east to the mid-channel of the Tongue River. Fidelity asserts that the claims of the United States, in trust for the Northern Cheyenne Tribe, conflict with the prior and superior ownership of the State in the bed of the Tongue River, which it attained upon statehood. Complaint, ¶ 23.

The resolution of this action will directly and materially affect both the sovereign, property, and financial interests of the State as well as its ability to fulfill its duties to its citizens in regard to all navigable waterways and water within the State, which the State owns under Article X, Section 11, of the Montana Constitution of 1972 in trust for its citizens. In Fidelity's Complaint, Prayer for Relief, p. 6, ¶¶ 1 and 2, Fidelity seeks an order quieting title in favor of the State to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation and for an order quieting title in favor of Fidelity to seven (7) Oil and Gas Leases it purchased from the State in October of 2002. As a sovereign and proprietor, the State has legally-cognizable interests in the ownership of the bed of the Tongue River and taxes and royalties resulting from oil and gas developed from the leases therein. Moreover, it has interests in this matter arising from its duties to its citizens in connection with its ownership and management of navigable waterways and water from the benefit of its citizens. Therefore, the State seeks to intervene because the disposition of this action will impair or impede the State's ability to protect these interests, and because Fidelity cannot reasonably be expected to adequately represent the citizens of this State or the State's interests.

Pursuant to Local Rule 7.1(j), the State has contacted the attorneys for Fidelity and Defendants concerning this Motion. Fidelity does not object to this Motion and the United States indicates they will probably not actively oppose the intervention, although the United States reserves the right to do so.

For the reasons set forth herein and in the accompanying brief, the State requests this Court for an order permitting it to intervene as a Plaintiff-Intervenor under Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted this 22<sup>nd</sup> day of October, 2004.

  
James W. Santoro  
Governor's Chief Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State of Montana's Motion for Intervention* was mailed, via U.S. mail, at Helena, Montana, on the 22<sup>nd</sup> of October, 2004, to:

Patricia Miller  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Indian Resources Section  
P.O. Box 44378  
Washington, DC 20026-4378

Jon Metropoulos  
Dana L. Hupp  
Gough, Shanahan, Johnson & Waterman  
33 South Last Chance Gulch  
P. O. Box 1715  
Helena, MT 59624

Civil Process Clerk  
Office of the United States Attorney  
2929 3d Avenue North, Suite 400  
P.O. Box 1478  
Billings, MT 59103

President George W. Bush  
The White House  
1600 Pennsylvania Avenue N.W.  
Washington, DC 20500

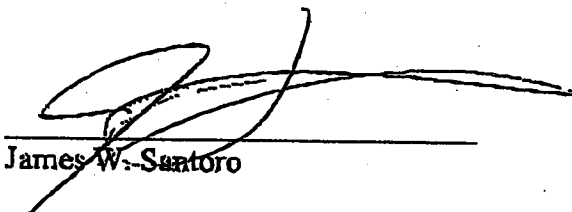
John Ashcroft  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530-0001

United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

Gale A. Norton  
Secretary of the Interior  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

United States Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

David W. Anderson  
Assistant Secretary - Indian Affairs  
Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240



---

James W. Santoro

James W. Santoro  
Governor's Chief Legal Counsel  
Room 204, State Capitol,  
P.O. Box 200801  
Helena, MT 59620-0801  
(406) 444-3111  
(406) 444-5529 (facsimile)  
Attorney for State of Montana  
Proposed Plaintiff-Intervenor

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION

FIDELITY EXPLORATION & PRODUCTION  
COMPANY,

Plaintiff,

and

STATE OF MONTANA,

Proposed Plaintiff-Intervenor,

v.

UNITED STATES OF AMERICA; UNITED  
STATES DEPARTMENT OF THE INTERIOR;  
GALE NORTON, in her official capacity as the  
United States Secretary of the Interior; UNITED  
STATES BUREAU OF INDIAN AFFAIRS;  
DÁVID ANDERSON, in his official capacity as  
Assistant Secretary, Bureau of Indian Affairs,

Defendants.

Cause No. CV-04-100-BLG-RWA

STATE OF MONTANA'S BRIEF  
IN SUPPORT OF MOTION FOR  
INTERVENTION

## I. INTRODUCTION

The State of Montana ("State") has moved this Court for an order permitting the State to intervene as a party plaintiff. This brief is filed in support of the State's Motion, pursuant to Local Rule 7.1(c).

On July 27, 2004, Fidelity Exploration & Production Company ("Fidelity") filed a Quiet Title action, 28 U.S.C. § 2409a, against the United States. In its Complaint, Fidelity asserts that the United States, in trust for the Northern Cheyenne Tribe, has claimed title to the bed of the Tongue River east of the Northern Cheyenne Indian Reservation, and that the United States' claim conflicts with the State's ownership of the bed of the Tongue River, and, therefore, Fidelity's property interest in seven (7) Oil and Gas leases for oil and gas development it purchased from the State in October 2002. The State now seeks to intervene for the purpose of protecting its significant sovereign, property, and financial interests at issue in this lawsuit as well as to fulfill its duties to its citizens in regard to navigable waterways and water within the State, which it owns under Article X, Section 11, of the Montana Constitution of 1972 in trust for its citizens.

Specifically, the State seeks to protect Montana citizens' rights to royalty and tax payments from the development of the State's natural resources. The citizens of the State have a legal right to any royalty and tax payments, as provided by Montana law and the terms of the oil and gas leases, with respect to natural gas resources owned by the State and leased to entities for the purposes of exploration and development. *See, e.g.* Exhibit A, Oil and Gas Lease, attached hereto. The State also seeks to protect its ownership of the bed of the Tongue River, which it holds in trust for the citizens of the State of Montana. Mont. Code. Ann. § 70-1-201 (2003). The State's duty to protect its citizens' rights to natural gas production revenues and ownership of the

bed of the Tongue River are unique interests, independent from Fidelity's. As such, the existing parties cannot be presumed to safeguard the State's interests.

Therefore, the State now moves to intervene in order to protect its sovereign, property and financial interests and to fulfill its duties to the citizens of the State in regard to navigable waterways and water. The State is entitled to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. In the alternative, the State's claims and defenses have questions of law and fact in common with Fidelity's claims; therefore, the State should be granted the right to permissive intervention under Rule 24(b)(2) of the Federal Rules of Civil Procedure.

## II. FACTUAL BACKGROUND

By Executive Order issued on November 26, 1884, President Chester A. Arthur created the original Northern Cheyenne Reservation. Complaint, ¶ 9. The original federal reservation was set apart from a portion of the Montana territory for the use and occupation of the Northern Cheyenne Indians. *Id.* The Reservation's original eastern boundary was approximately ten miles west of the Tongue River. *Id.*, ¶ 10.

The Tongue River was one of the navigable rivers the United States held in trust for the State. The headwaters of the Tongue River are located in the State of Wyoming. The River has a northeasterly flow, crossing through southeast Montana to its confluence with the Yellowstone River near Miles City, Montana.

In 1889, the State of Montana attained statehood pursuant to the Dakota, Montana and Washington Enabling Act, 25 Stat. 676. Section 8 of the Enabling Act and the equal footing doctrine granted the State admission to the United States "on an equal footing with the original

states." *Id.* Admission under equal footing with the original states vested the State with the sovereign ownership of the bed of all navigable waters within its boundaries.

In a Lease Sale held on September 4, 2002, Fidelity purchased seven (7) Oil and Gas Leases from the State of Montana. The leases are located in Rosebud County and specifically, include the portion of the bed of the Tongue River in dispute in this lawsuit. Complaint, ¶ 24. Fidelity asserts that it initiated this lawsuit "to adjudicate a disputed title to real property it owns in which the United States claims an interest. Specifically, Fidelity initiated this suit to quiet title against the United States to remove a cloud from the title underlying, and consequently its ownership of, seven (7) Oil and Gas Leases Fidelity purchased from the State of Montana on September 4, 2002, which are located in the bed of the Tongue River." Complaint, Introduction. Under State law, the State owns all navigable waterways and all water within its boundaries. It holds these property interests in its sovereign capacity and in trust for its citizens. Mont. Const. Art. X, Section 11.

### III. ARGUMENT

Disposition of the claims asserted in Fidelity's Complaint will significantly impact the substantial property and financial interests of the State of Montana. Specifically, the State has a legally-cognizable interest in the bed of the Tongue River and the taxes and royalties collected from natural gas production, which are the subject of this lawsuit. *See*, Legal description contained in Fidelity's Complaint. Consequently, the State moves the Court for leave to intervene because the disposition of this action may impair or impede the State's ability to protect these interests, and because Fidelity cannot reasonably be expected to adequately represent the citizens of the State or their interests.

The State is entitled to intervention as a matter of right, or alternatively, permissive intervention. Fed. R. Civ. P. 24(a) - (b) (2004). Rule 24 provides, in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24 must be construed "liberally in favor of potential intervenors." *S.W. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 626 (S.D. Iowa 1993), modified on other grounds, 151 F.R.D. 338 (S.D. Iowa 1993) ("Rule 24 is to be construed liberally with all doubts resolved in favor of permitting intervention."); accord *Ark. Elec. Energy Consumers v. Middle S. Energy, Inc.*, 772 F.2d 401, 404 (8th Cir. 1985); *Warheit v. Osten*, 57 F.R.D. 629, 630 (E.D. Mich. 1973) (Rule 24 "should be read to allow intervention in as many situations as possible."). Accordingly, in the present case any question regarding the State's Motion should be resolved in favor of intervention.

**A. The State Is Entitled To Intervention As A Matter Of Right Under Federal Rule Of Civil Procedure 24(a).**

An applicant's right to intervene under Rule 24(a) is determined by the following four-part test:

(1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

*S.W. Ctr.*, 268 F.3d at 817; *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1107-08 (9th Cir. 2002) (citing *Wetlands Action Network v. U.S. Army Corps of Engrs.*, 222 F.3d 1105, 1113-14 (9th Cir. 2000)); *Sierra Club v. E.P.A.*, 995 F.2d 1478, 1481 (1993). If the four criteria are met, "[t]he district court must grant the motion to intervene." *U.S. v. Wash.*, 86 F.3d 1499, 1503 (9th Cir. 1996), citing *Greene v. U.S.*, 996 F.2d 973, 976 (9th Cir. 1993). As demonstrated below, the State conclusively meets all four criteria. Consequently, the State is entitled to intervene as matter of right, in accordance with Rule 24(a) of the Federal Rules of Civil Procedure.

1. The State's motion to intervene is timely.

The first element the Court is to consider in addressing a Rule 24(a) motion is whether the motion is timely. *S.W. Ctr.*, 268 F.3d at 817. In determining timeliness, courts examine three factors: the stage of the proceedings, the prejudice to existing parties, and the length of and reason for the delay. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997), citing *County of Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986).

The State's Motion is timely because this case is at its inception. The Defendants have not filed their answer, no scheduling order is in place, nor has any discovery been served. No substantive briefing has occurred and no procedural deadlines have passed. Hence, the fact that this case is at such an early stage of the proceeding weighs conclusively in favor of intervention.

Moreover, in light of the procedural posture of this case, no existing party would suffer any prejudice or other detriment in connection with State's intervention. In fact, the State's intervention will aid in resolving the substantive questions at issue in this lawsuit. The final timeliness factor, the reason for the delay in the motion to intervene, does not apply, because no delay has occurred. The State has thus met its burden of proving the timeliness of its Motion.

2. The State has a "significantly protectable" interest relating to the property or transaction that is the subject matter of the litigation.

Intervention applicants must also assert a "significantly protectable" interest relating to property or a transaction that is the subject matter of litigation. *Kootenai Tribe*, 313 F.3d at 1107-08. No specific legal or equitable interest need be established. *S.W. Ctr.*, 268 F.3d at 818. "It is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Id.*, quoting *Sierra Club*, 995 F.2d at 1484. Here, the State's interests in taxes and royalties and its ownership in the bed of its rivers are, indeed, "significantly protectable."

*Wyandotte Nation v. City of Kansas City*, 200 F.Supp. 2d 1279 (D.Kan. 2002), is particularly instructive. There, the Wyandotte Nation sought a declaratory judgment quieting title to lands located in Kansas City. The original defendants were the city and the county. *Id.* at 1282. The State of Kansas moved to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. *Id.* at 1287. Although the State of Kansas did not have a basis for fee title to the disputed property, the State of Kansas argued that its interest relating to the property at issue justified intervention. Specifically, the State argued – and the court agreed – that if the tribe prevailed and title to the land was quieted in favor of the tribe, "Kansas would lose the taxation, regulatory, and jurisdictional powers it exercises over these lands." *Id.* at 1288. The State of

Kansas further argued that "[l]and held in trust by the federal government on behalf of Native American tribes is exempted from state or local taxation by 25 U.S.C. § 465, and from local zoning and regulatory requirements pursuant to 25 C.F.R. § 1.4(a)." *Id.* The State of Kansas also argued that a ruling for the tribe would extinguish the state's criminal and civil jurisdiction, and would deprive Kansas of its powers of escheat and eminent domain over the tracts of land at issue in the suit. *Id.* Even though the State of Kansas lacked a direct claim of title, the court concluded that "Kansas has articulated a direct, substantial, and legally protectable interest," and that intervention as of right would be permitted. *Id.* In the present case, the State of Montana's argument for intervention is even stronger because the State of Montana has a substantial basis for claiming an ownership interest in the subject property.

In *Sierra Club v. EPA*, the Ninth Circuit held that the City of Phoenix was entitled to intervene as of right in an action brought by the Sierra Club against the EPA. The Sierra Club sought to have the EPA promulgate water quality standards for final pollutant discharge permits "that reduce toxics being discharged from each of the Arizona point sources." *Id.* at 1480. "In practical terms, the Sierra Club wanted the court to order the EPA to change the City's [water discharge] permits." *Id.* at 1481. The Ninth Circuit held that the City could intervene as of right because the City's status as an EPA permittee could be affected when the relief sought would require the EPA to make the City's permits more restrictive. *Id.* at 1486. There, the City had already acquired enforceable water discharge permits from the EPA under the CWA. *Id.* at 1482. The Ninth Circuit emphasized that "the lawsuit would affect the use of real property owned by the intervenor by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely in the class of interests traditionally protected by law." *Id.* at 1483.

So it is in the present case. The lawsuit impacts the State's "significantly protectable" property and financial interests. The State has a significant property interest in the ownership of the bed of the Tongue River. Further, the State has a significant interest in the taxes from oil and gas production. Title 15, Chapter 36 of the Montana Code Annotated provides that the State, including Montana's schools, will receive a portion of the taxes from oil and gas production. *See generally*, Mont. Code Ann. §§ 15-36-331 - 332 (2003). Further, the State is entitled to rental and royalty payments as set forth in its Oil and Gas Leases. *See generally* Exhibit A. Because the current lawsuit impacts these "significantly protectable" property interests, intervention must be permitted.

3. **The State is situated so that disposition of this action may as a practical matter impair or impede its ability to protect its interests.**

The third element for the court's consideration is whether the disposition of the action may, as a practical matter, impair or impede the potential intervenor's ability to protect its interest. *S.W. Cr.*, 268 F.3d at 817. The very nature of a federal quiet title action is to determine who owns the title to real or personal property over which the United States has asserted some interest. *Koehler v. U.S.*, 153 F.3d 263, 267, n. 5 (5th Cir. 1998); *see also MacElvain v. U.S.*, 867 F.Supp. 996, 1003 (M.D.Ala. 1994). Here, Fidelity asserts a leasehold interest in the subject property; and both the United States and the State assert conflicting fee interests in the subject property. It logically follows that the State must be permitted to participate as a real party in interest in this quiet title suit, in order to ensure proper adjudication of the State's claimed interests.

As discussed above, the final disposition of Fidelity's claims will have an extraordinary impact on the State's duty to protect its property and financial interests. The disposition of this

lawsuit could result in the State losing substantial tax revenue or royalties and ownership in the bed of the Tongue River along the eastern boundary of the Tongue River. Therefore, the Court should grant the State's Motion for Intervention, so to ensure the State has the opportunity to protect its unique interests.

4. The State's interest is inadequately represented by the parties.

The final criterion for intervention as of right is that the applicant's interest must be inadequately represented by the existing parties. *Wetlands Action Network*, 222 F.3d at 1113-14; *Sierra Club*, 995 F.2d at 1481; *Mont. v. U.S. EP.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998). "The applicant-intervenor's burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate." *Forest Conservation Council*, 66 F.3d at 1498 (emphasis in original), citing *Tybovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972).

"In determining whether a would-be intervenor's interests will be adequately represented by an existing party, courts consider: (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *S.W. Ctr.*, 268 F.3d at 822, citing *N.W. Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996); and *Cal. v. Tahoe Regl. Plan. Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

The interests of a governmental entity vary substantially from that of a private corporation. As a developer of coalbed natural gas resources, Fidelity's interests differ from that of the State's. Although the State has a financial interest in the efficient and responsible development of these resources, the State also has additional duties to the citizens of the State, including its responsibility as trustee of title to the beds of navigable

bodies of water in trust for the citizens of the State. Mont. Code Ann. § 70-1-202. The Ninth Circuit has recognized this fact in *Southwest Center* and provided that "[t]he interests of government and the private sector may diverge." *S.W. Ctr.*, 268 F.3d at 823. Because Fidelity's interests are more limited and may diverge from those of the State's in the discharge of its official duties, and because Fidelity cannot be charged with safeguarding the interests of the State, it cannot be said that the Fidelity is both capable and willing to make the State's arguments. Hence, the State must be granted intervention to protect its interests.

**B. The State Is Entitled To Permissive Intervention Under Federal Rule Of Civil Procedure 24(b)(2).**

The State is entitled to intervene as of right. Alternatively, the State is entitled to permissive intervention under Federal Rule of Civil Procedure 24(b). Permissive intervention is governed by Rule 24(b):

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As demonstrated below, the State meets the Rule 24(b) criteria for intervention in this lawsuit.

An important distinction exists between permissive intervention under Rule 24(b) and intervention as of right under Rule 24(a). Specifically, one seeking permissive intervention need not demonstrate "a significant protectable interest." *Kootenai Tribe*, 313 F.3d at 1108. Similarly, Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct or pecuniary interest in the subject of the litigation." *Id.*, quoting *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940).

Three prerequisites exist for permissive intervention pursuant to Rule 24(b)(2): "[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *League of United Latin Am. Citizens*, 131 F.3d at 1308. Each is discussed below.

1. Independent grounds for jurisdiction exist.

Although permissive intervention ordinarily requires independent jurisdictional grounds, the requirement of independent grounds for jurisdiction is not absolute, and does not apply in every case. *Beckman Indus., Inc. v. Intl. Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). In any event, the Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 2409a, 1346, and 1331.

The Court also has supplemental jurisdiction over intervention claims pursuant to 28 U.S.C. § 1367, which provides in relevant part, that "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

2. The State's motion to intervene is timely.

The timeliness factors for permissive intervention under Rule 24(b) are precisely the same as intervention as of right under Rule 24(a). *League of United Latin Am. Citizens*, 131 F.3d at 1308. As established in Part III, Section A, sub-section 1, *supra*, incorporated herein by reference, the State's motion to intervene is timely because this case is at its inception, no

existing party would suffer prejudice as a result of intervention, and the State has not delayed in moving to intervene. Timeliness is thus conclusively established.

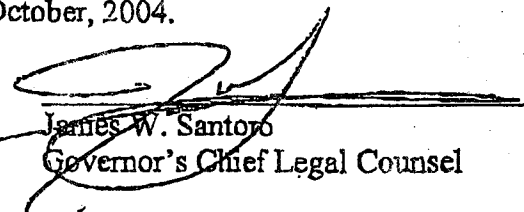
3. The State's claims and the main action have questions of law and fact in common.

The third and final prerequisite for permissive intervention is that "the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *League of United Latin Am. Citizens*, 131 F.3d at 1308. Applicants for permissive intervention satisfy this requirement where they will "assert defenses of the government [decision] that squarely respond to the challenges made by plaintiffs in the main action." *Kootenai Tribe*, 313 F.3d at 1111. As set forth in the State's Motion for Intervention, the State's claim has a question of law and a question of fact in common. The State, similarly to Fidelity, has asserted "that pursuant to 28 U.S.C. § 2409a, it is entitled to a decree from the Court quieting title to the bed of the Tongue River east of the Northern Cheyenne Reservation in favor of the State and against all Defendants who may claim an interest conflicting with the State." *Motion for Intervention*, n. 1. Therefore, the State's claim and the main action have common questions of fact and law.

#### IV. CONCLUSION

For the foregoing reasons, the State of Montana respectfully requests this Court for an order permitting it to intervene as a party plaintiff under Rule 24(a)(2) of the Federal Rules of Civil Procedure. In the alternative, the State requests intervention under Rule 24(b)(2).

Respectfully submitted this 22<sup>nd</sup> day of October, 2004.

  
James W. Santoro  
Governor's Chief Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *State of Montana's Brief in Support of its Motion for Intervention* was mailed, via U.S. Mail, at Helena, Montana, on the 22<sup>nd</sup> of October 2004, to:

Patricia Miller  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Indian Resources Section  
P.O. Box 44378  
Washington, DC 20026-4378

Jon Metropoulos  
Dana L. Hupp  
Gough, Shanahan, Johnson & Waterman  
33 South Last Chance Gulch  
P. O. Box 1715  
Helena, MT 59624

Civil Process Clerk  
Office of the United States Attorney  
2929 3d Avenue North, Suite 400  
P.O. Box 1478  
Billings, MT 59103

President George W. Bush  
The White House  
1600 Pennsylvania Avenue N.W.  
Washington, DC 20500

John Ashcroft  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue N.W.  
Washington, DC 20530-0001

United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

Gale A. Norton  
Secretary of the Interior  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

United States Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

David W. Anderson  
Assistant Secretary - Indian Affairs  
Bureau of Indian Affairs  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240



James W. Santoro

ATTORNEY GENERAL  
STATE OF MONTANA

Mike McGrath  
Attorney General



Department of Justice  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

October 26, 2004

Mr. James W. Santoro  
Office of the Governor  
P.O. Box 200801  
Helena, MT 59620-0801

Re: Fidelity Exploration and Production Co. v. United States et al., U.S. Dist. Ct.  
Docket No. CV 04-100-BLG-RWA

Dear Mr. Santoro:

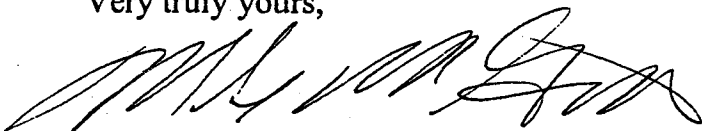
We have been provided with a copy of an intervention pleading you have filed in the above action, purporting to appear as "Attorney for the State of Montana." You have never been designated as a Special Assistant Attorney General and I have not otherwise authorized you to represent the State in the above litigation. As you know, the Board of Land Commissioners voted not to intervene in the above matter and I have concluded as the State's legal officer that intervention on behalf of the State is not warranted at this time. Accordingly, you are directed to refrain from taking any action on behalf of the State or the Board of Land Commissioners in the above matter, and to file an amended pleading clarifying that your motion for leave to intervene is not brought on behalf of the State and that you do not represent the State in the action. You may, of course, appear and represent any interest that the Governor may have in her official capacity, provided you refrain from suggesting that her positions represent the positions of the State of Montana or the Land Board.

As you are probably aware, Mont. Code Ann. § 2-15-201(5) provides that the Governor may "direct the attorney general to appear on behalf of the state" "[w]henever any suit or legal proceeding . . . may affect the title of this state to any property." This statute does not empower the Governor to intervene in the above action on behalf of the State. To the contrary, by its requirement that the Governor act only through the Attorney General, it appears to recognize that the Governor lacks the authority to act on her own.

Mr. James W. Santoro  
October 26, 2004  
Page Two

In any event, the statute cannot constitutionally empower the Governor to direct the actions of the State's legal officer, Mont. Const. Art. VI, § 4(4), and cannot empower the Governor to overrule the decision of the Board of Land Commissioners, the body constitutionally empowered to control matters relating to state lands, Mont. Const. art. X, § 4.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Mike McGrath', written in a cursive style.

MIKE McGRATH  
Attorney General

cdt/brf

c: Governor Judy Martz  
State Auditor John Morrison  
Secretary of State Bob Brown  
Superintendent of Public Instruction Linda McCulloch

OFFICE OF THE GOVERNOR

STATE OF MONTANA

JUDY MARTZ  
GOVERNOR

STATE CAPITOL  
PO Box 200801  
HELENA, MONTANA 59620-0801



Delivered by Personal Service

October 28, 2004

Mr. Mike McGrath  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

Re: *Fidelity Exploration and Production Co. v. United States, et al.*, US Dist. Ct. Docket No.  
CV 04-100-BLG-RWA

Dear Mr. McGrath:

I am responding to your letter of October 26, 2004 requesting that my attorney refrain from taking further action on behalf of the State in the above matter. You do not have the power or authority to direct my Chief Legal Counsel, under my direction and orders, to cease representation.

As you know, the Montana Constitution (Article VI, Section 4) provides that the **executive power is vested in the governor**. Further, Section 2-15-201(5), MCA in its entirety reads: "Whenever any suit or legal proceeding is pending against this state or which **may affect the title of this state** to any property or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state and **may employ such additional counsel as he may judge expedient.**"

Furthermore, as you may recall, precedent indicates that you are not the sole entity to represent the State of Montana. See, *Montana Power Co. v. Montana Dept. of Public Service Regulation*, 218 Mont. 471, 709 P.2d 995 (1985).

For these reasons, I have directed my Chief Legal Counsel to intervene on behalf of the State of Montana and I am directing you, as the State's Attorney General, not as a member of the Board of Land Commissioners, to assist my counsel in his efforts. See, *Section 2-15-201(5), MCA and Section 2-15-501(6), MCA*.

Sincerely,

A handwritten signature of Judy Martz in black ink.

JUDY MARTZ  
Governor

c: Secretary of State Bob Brown  
State Auditor John Morrison  
Superintendent of Public Instruction Linda McCulloch

TELEPHONE: (406) 444-3111 FAX: (406) 444-4151

EXHIBIT

D